CASE BEING CONSIDERED FOR TREATMENT PURSUANT TO RULE 34(j) OF THE GENERAL RULES

No. 05-5359

IN THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

WE THE PEOPLE FOUNDATION, INC., et al.

Appellants

v.

UNITED STATES OF AMERICA, et al.,

Appellees

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

(a) *Parties and Amici.* The following are all parties, intervenors, and amici who appeared before the district court and in this court:

Cherie Austin, plaintiff-appellant

Gary Austin, plaintiff-appellant

Ryan Austin, plaintiff-appellant

Steven Perry Austin, plaintiff-appellant

Joseph Banister, plaintiff-appellant

Jerrold L. Bergemeyer, plaintiff-appellant

Frank R. Bootz, plaintiff-appellant

John Boyce, plaintiff-appellant

Terry Bressi, plaintiff-appellant

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Richard L. Bristol, plaintiff-appellant

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John Bruner, plaintiff-appellant

Brian P. Brush, plaintiff-appellant

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Craig M. Coble, plaintiff-appellant

Ronald W. Coble, plaintiff-appellant

Constitutional Defender Society, proposed *amicus* on appeal

Cheryl L. Cook, plaintiff-appellant

James T. Cook, plaintiff-appellant

Roger D. Cook, plaintiff-appellant

Sheila Cook, plaintiff-appellant

Stephen Cook, plaintiff-appellant

Johnny W. Corley, plaintiff-appellant

Cecelia Grace, plaintiff-appellant

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Jackie Harrell, plaintiff-appellant

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Sherry Peel Jackson, plaintiff-appellant

Louis M. Joy, plaintiff-appellant

Stacy Kline, plaintiff-appellant

Bob J. Malone, plaintiff-appellant

Mary Malone, plaintiff-appellant

Joseph Nelson, plaintiff-appellant

Aleta Q. Parker, plaintiff-appellant

David R. Parker, plaintiff-appellant

Queen Aleta Parker, plaintiff-appellant

Harrison Pugh, plaintiff-appellant

Kenneth Ray Pugh, plaintiff-appellant

David Schneider, plaintiff-appellant

Robert L. Schultz, plaintiff-appellant

Leon Sikes, plaintiff-appellant

Marilyn Smith, plaintiff-appellant

Jerry D. Stromer, plaintiff-appellant

Alvin A. Tolbert, plaintiff-appellant

John Turner, plaintiff-appellant

U. S. Department of Justice, defendant-appellee

U. S. Treasury Department, defendant-appellee

United States of America, defendant-appellant

We the People Congress, Inc., plaintiff-appellant

We the People Foundation, Inc., plaintiff-appellant

James A. Williams, plaintiff-appellant

John Wolfgram, proposed *amicus* on appeal

Don C. Wornock, plaintiff-appellant

(B) *Rulings under review.* The ruling under review is the order of the United States District Court for the District of Columbia entered August 31, 2005 (A. 13),[1] pursuant to the court's opinion and order also entered August 31, 2005 (A. 6–12).

(C) *Related cases.* This case has not previously been before this Court or any other appellate court or court in the District of Columbia, except for the case currently under appeal to this Court. We are aware that the appellants cite *Robert L. Schulz, et al. v. Washington County Board of Supervisors, et al.* (2nd Cir. – No. 05-0259), as a related case.

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[1] "A." references are to pages in the separately bound record appendix. "R." references are to docket items in the record below as numbered by the clerk of the district court.

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GLOSSARY

Abbreviation	*Definition*
A.	Appellants' appendix
Amicus Br.	Brief of proposed *amici curiae* Constitutional Defender Association and John Wolfgram
Br.	Appellants' brief
Code or I.R.C.	Internal Revenue Code (26 U.S.C.)
FTCA	Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 *et seq.*
R.	Docket items in the record as numbered by the clerk of the district court
WTP	Appellants We the People Foundation, Inc., We the People Congress, Inc., and named individuals

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BRIEF FOR THE APPELLEES

STATEMENT OF JURISDICTION

On July 19, 2004, appellants We the People Foundation, Inc., We the People Congress, Inc., and several named individuals (collectively, "WTP") filed a complaint and, on September 16, 2004, an amended

complaint in the district court against the United States, the U.S. Treasury Department, the Internal Revenue Service, and the U.S. Department of Justice (collectively, "the Government"), seeking declaratory and injunctive relief. (R. 1; A. 14–134.)[1] WTP asserted jurisdiction under 28 U.S.C. §§ 1331, 1343, 1391(e), and 2679(b)(1) and 42 U.S.C. § 1983. (A. 90–91.) As explained below, the district court lacked jurisdiction over WTP's claims because sovereign immunity had not been waived. In any event, the amended complaint failed to state a claim upon which relief could be granted.

The district court (Hon. Emmet G. Sullivan) entered judgment in favor of the Government on August 31, 2005. (A. 13.) On September 15, 2005, within 60 days thereafter, WTP filed a notice of appeal (R. 30), which was timely under 28 U.S.C. § 2107 and Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

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[1] "A." references are to pages in the separately bound record appendix. "R." references are to docket items in the record below as numbered by the clerk of the district court.

STATEMENT OF THE ISSUES

1. Whether WTP's claims were subject to dismissal for lack of subject-matter jurisdiction because the Government had not waived its sovereign immunity to those claims.

2. Whether the complaint was correctly dismissed for failure to state a claim upon which relief could be granted where WTP failed to show that the Government had a duty to respond to its requests for information or to refrain from enforcing the federal tax laws against individual plaintiffs.

STATUTES AND REGULATIONS

All relevant statutes are set forth in the addendum to this brief.

STATEMENT OF THE CASE

This is an action to compel the United States (i) to provide "documented and specific answers" to questions that WTP presented to certain Government officials respecting the constitutionality of the federal income tax and other Government programs and activities and (ii) to enjoin the Government from enforcing the federal tax laws with respect to individual plaintiffs. (A. 78–79, 102–03.)

The Government moved to dismiss the amended complaint for lack of subject-matter jurisdiction and failure to state a claim upon which relief could be granted. (A. 135–62.) The district court issued an order, unofficially published at 96 A.F.T.R.2d (RIA) 6126, dismissing the complaint pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim. (A. 6–13.) This appeal followed.

STATEMENT OF THE FACTS

WTP instituted this action by filing a complaint and an amended complaint against the Government. (A. 14–103.) The amended complaint identified plaintiff We the People Foundation as a not-for-profit research and educational foundation that "has been spearheading, since 1999, a nationwide effort to get the government to answer specific questions, first regarding the government's violation of the taxing clauses of the Constitution, and then, beginning in 2002, regarding the government's violation of the war powers, money and 'privacy' clauses of the Constitution." (A. 80.) It identified plaintiff We the People Congress as a not-for-profit membership organization whose mission "is to scrutinize governmental behavior at every level, compare that

behavior with the requirements of the State and federal Constitutions," and then to "non-violently confront unconstitutional and illegal behavior by elected and/or appointed public officials." (A. 80.) The amended complaint identified as individual plaintiffs Robert L. Schulz, Joseph Banister, John Turner, Sherry P. Jackson, Clifton Beale, and Paul Chappell. (*See* R. 6.)[2] It referred to individuals named in the caption but not in the body of the amended complaint as additional plaintiffs. (A. 80–81.)

The amended complaint alleged that WTP had petitioned the Government for "Redress of Grievances" relating "to the taxing clauses of the Constitution and the direct, un-apportioned tax on labor." (A. 81; *see also* 84, 85, 88.) It asserted that WTP had asked the Government to show "where in the Internal Revenue Code it explicitly imposes the legal obligation on an individual American worker to pay taxes on his/her wages or the American companies that hire such workers must withhold." (A. 96.) The amended complaint alleged that WTP had

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[2] References to Jackson and Chappell have been deleted from the copy of the amended complaint included in the appendix. (A. 82.)

submitted similar petitions relating to "the war powers clauses of the Constitution and the Iraq Resolution, the money clauses of the Constitution and the Federal Reserve System and the 'privacy' clauses of the Constitution and the USA Patriot Act." (A. 84, 85, 88.) It asserted that unidentified individual plaintiffs had "given further expression" to their First Amendment rights "by not withholding and turning over to [the Government] money earned by him/her as a result of his/her labor." (A. 80–81.)

The amended complaint alleged that the Government had failed "to properly respond" to WTP's petitions. (A. 79, 84, 85, 87, 89.) It further alleged that individual plaintiffs "were suffering retaliation" from the Government "for Petitioning . . . for Redress of Grievances and for Peaceably Assembling and Associating with other individuals under the umbrella and auspices of the Plaintiff We The People organizations." (A. 82.) It asserted that the Government had retaliated "by sending Plaintiffs threatening letters; placing liens on Plaintiffs' property; levying and seizing Plaintiffs' property and/or wages; raiding Plaintiffs' homes and/or offices; forcing Plaintiffs to appear before administrative,

civil and/or criminal tribunals; denying Plaintiffs due process; or by other enforcement actions." (A. 89; *see also* A. 82, 85, 99–100.)

In its prayer for relief, WTP sought an order "constraining the defendants to meet their obligations under relevant law . . . to provide to the Plaintiffs documented and specific answers to the reasonable questions asked of them by the Plaintiffs" and to address "each of the issues . . . raised by the Plaintiffs in their various Petitions to representatives of the United States Government." (A. 102.) WTP further sought a temporary injunction prohibiting the Government from taking actions "against the named Plaintiffs in this proceeding and against all others similarly situated" in retaliation "for attempting to Petition the United States Government," for assembling, for acting as plaintiffs in this action, or for the exercise of other constitutional rights. (A. 102–03.)

The amended complaint attached an affidavit by plaintiff Robert L. Schulz, chairman of We the People Foundation. (A. 104–34.) Schulz described WTP's "process of petitioning the federal government for a Redress of Grievances relating to the direct, un-apportioned tax on

labor" and its "'Operation Stop Withholding,' a national campaign to instruct company officials, workers and independent contractors on how to legally stop withholding, filing and paying the income taxes." (A. 105, 131.) He attached as exhibits copies of correspondence from WTP to various Government officials, primarily respecting the constitutionality of the federal income tax. (R. 7, exhibits; A. 248–537.)

Among these exhibits, a document described as a petition forwarded to the Justice Department in March 2002 propounded "538 questions, broken down into fifteen 'lines of inquiry.'" (A. 127, 334.) Among these "lines of inquiry" were assertions that: "the Internal Revenue Code does not make most Americans liable to file a tax return and pay an income tax" (A. 353); "the income tax is a slave tax, prohibited by the 13th Amendment" (A. 359); "Congress lacks the Authority to legislate an income tax on the people except in the District of Columbia, the US Territories and in those geographic areas within any of the 50 states where the States have specifically authorized it" (A. 370); and "the 16th Amendment did not come close to being ratified but was fraudulently declared to have been ratified" (A. 387). Most of the

questions were requests for admissions, including the following: "[a]dmit that there is no statute anywhere in Subtitle A of the Internal Revenue Code which makes any person *liable* for the tax imposed in 26 U.S.C. § 1 or 26 U.S.C. § 871" (A. 357 (emphasis in original)); "[a]dmit that Americans own less of their labor than feudal serfs" (A. 366); "[a]dmit that . . . it is a violation of due process and a violation of delegated authority for any IRS tax official to refer to any person as a 'taxpayer' who does not first identify him or herself as such *voluntarily*" (A. 375 (emphasis in original)); "[a]dmit that there are no implementing regulations . . . which authorize imposition by the government of penalties or interest for nonpayment of the tax imposed under 26 U.S.C. § 1 or 26 U.S.C. § 871" (A. 413); and "[a]dmit that United States Supreme Court Chief Judge Taney in 1863 protested the constitutionality of the income tax as applied to him" (A. 428).

The Schulz affidavit attached as additional exhibits four petitions presented to Congress and the President in November 2002. (A. 129, 445–68.) The petition "for redress of grievances relating to the federal income tax" requested the President, *inter alia*, to "[d]irect the

Department of Justice to immediately cease all civil and criminal investigations, grand jury activity and prosecutions related to enforcement of federal Individual Income Tax laws" and "all investigations, enforcement and administrative activity related to the payment of taxes on individual income"; to "order the release of all persons currently in prison on convictions of crimes related to the individual income tax" and to grant "immediate Presidential pardons to any individual that has been convicted of an income tax crime"; to "[d]irect the IRS to inform the general public, all employers and tax payers that wage withholding, filing of returns and payment of monies for individual income tax purposes is not mandatory"; and to "[s]ubmit to Congress a bill calling for the formal repeal of the federal Individual Income Tax laws." (A. 467–68.)

The remaining petitions sought "redress of grievances" relating to "the application of the armed forces of the United States in Iraq without a congressional declaration of war," "the 'war on terrorism,'" and "the Federal Reserve System." (A. 446–64.) These petitions asked the Government to admit that, *inter alia*, "War Powers Resolution 50 U.S.C.

§ 1541 et seq., is violative of the War Powers Clauses: Article I, Section 8, clauses 10, 11, 14, 15 and 16 of the U.S. Constitution" and "the draft Resolution the President submitted to Congress in September, 2002, regarding the application of the armed forces of the United States against Iraq, would, if passed by Congress, represent an unconstitutional delegation by the Congress to the Executive of the War Powers reserved to Congress by . . . the U.S. Constitution" (A. 450); "the President's November 11, 2001 executive order on military commissions for trying unlawful combatants is the equivalent of the Taliban's secret Star Chamber" (A. 456); and "the Federal Reserve Banks are repugnant to the Constitution" (A. 463).

The Government moved to dismiss the amended complaint for lack of subject-matter jurisdiction and for failure to state a claim upon which relief could be granted. (A. 135–64.) In its motion, the Government also noted that, although over 1,450 individual plaintiffs were listed in the caption, only six were properly identified as plaintiffs in the body of the amended complaint. (A. 80, 82.) WTP sought leave to file a second

amended complaint in order, *inter alia*, to add plaintiffs by identifying them in the body of the complaint. (R. 15.)

The district court granted the Government's motion to dismiss, holding that the amended complaint failed to state a claim upon which relief could be granted. (A. 6–13.) The court observed that the Supreme Court has held that the First Amendment does not impose any affirmative obligation on the Government to respond to citizens' petitions. (A. 8 (quoting *Smith v. Arkansas State Highway Employees, Local 1315*, 441 U.S. 463, 465 (1979)). Accordingly, the court held, WTP's claims that the Government was required to "properly" respond to WTP's petitions failed to state a claim upon which relief could be granted. (*Ibid.*)

As for WTP's claims that the Government had retaliated against individual plaintiffs for exercising their First Amendment rights, the court noted that it appeared from the petition that these plaintiffs had challenged the validity of the income-tax laws by refusing to pay their income taxes, with the result that the IRS had taken enforcement actions against them. (A. 8–9.) The court observed that Congress has

provided methods for challenging the legitimacy of such enforcement actions by way of, *inter alia*, hearings pursuant to Sections 6320 and 6330 of the Internal Revenue Code ("I.R.C." or "Code") (26 U.S.C.), actions for wrongful levy under I.R.C. § 7426(a), and refund actions under I.R.C. § 7422(a). (A. 9.) The court held that individual plaintiffs had no First Amendment right to withhold money owed to the Government and to avoid governmental enforcement actions because they object to Government policy. (*Ibid.*) The court added that the injunctive relief WTP sought against such enforcement actions was barred by the Anti-Injunction Act, I.R.C. § 7421, and the tax exception to the Declaratory Judgment Act, 28 U.S.C. § 2201(a). (A. 10.) The court also denied as futile WTP's motion for leave to file a second amended complaint. (A. 11.)

SUMMARY OF ARGUMENT

1. This case was subject to dismissal for lack of subject-matter jurisdiction because WTP failed to show a waiver of the Government's sovereign immunity to its claims. In its amended complaint, WTP asserted jurisdiction under 28 U.S.C. §§ 1331 and 1343, which provide

district courts with jurisdiction over civil actions arising under federal law and civil-rights actions; neither statute waives the Government's sovereign immunity. WTP also looked to 42 U.S.C. § 1983, which creates a cause of action for violation of federal rights by officials acting under color of state law, to support jurisdiction. That statute, however, does not apply to federal officers acting, as here, under color of federal law.

WTP also asserted that the court had jurisdiction under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671 *et seq.* That statute is inapplicable here, as it waives the Government's immunity for claims seeking damages for common-law torts committed by federal employees, not for actions seeking injunctive relief. This Act also expressly excludes from its waiver suits respecting the assessment or collection of taxes, like this one, and requires that the plaintiff have filed an administrative claim for relief, a jurisdictional prerequisite that WTP does not allege to have taken place here.

Although not relied on in its complaint, WTP argued in the district court that Section 702 of the Administrative Procedure Act (5 U.S.C.)

waives sovereign immunity to its claims. The provision permits suit for nonmonetary relief to persons aggrieved by certain agency actions. But WTP failed to allege or show a final "agency action within the meaning of a relevant statute" reviewable under Section 702. Moreover, Section 702 expressly provides that nothing in that provision "affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground." Here, it is plain from the complaint that WTP's claims are no more than attempts to interfere with the Government's ability to assess and collect income and social security taxes. As such, WTP's claims are made unreviewable by the Anti-Injunction Act, I.R.C. § 7421(a), which provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person."

2. The district court correctly dismissed WTP's amended complaint for failure to state a claim upon which relief could be granted. As the court held, WTP had no First Amendment right to receive the response it demanded to its petitions. The Supreme Court has held that

the Constitution does not provide private individuals or groups with the right to receive responses to questions in documents denominated "petitions." Moreover, the First Amendment does not permit a taxpayer to withhold his federal taxes and avoid governmental enforcement actions because the taxpayer disagrees with the Government's policies.

The district court should be directed to dismiss the case for lack of jurisdiction or, in the alternative, the district court's order should be affirmed.

ARGUMENT

I

WTP's amended complaint was subject to dismissal for lack of subject-matter jurisdiction

Standard of review

Whether a complaint is subject to dismissal for lack of subject-matter jurisdiction is a question of law to be reviewed *de novo*. *National Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1432 (D.C. Cir. 1995).

A. Introduction: sovereign immunity

The United States, as sovereign, may not be sued without its consent, the terms of which define the court's jurisdiction. *FDIC v. Meyer*, 510 U.S. 471, 475 (1994); *United States v. Dalm*, 494 U.S. 596, 608 (1990); *United States v. Sherwood*, 312 U.S. 584, 586 (1941). Waivers of sovereign immunity "cannot be implied but must be unequivocally expressed," *United States v. Mitchell*, 445 U.S. 535, 538 (1980), and must be "strictly construe[d]" in favor of the sovereign, *Lane v. Pena*, 518 U.S. 187, 192 (1996). *See also Webman v. Federal Bureau of Prisons*, 441 F.3d 1022, 1025 (D.C. Cir. 2006). Consequently, no suit may be maintained against the sovereign unless the suit is brought in strict compliance with the terms of a statute under which the sovereign has consented to be sued. *United States v. Idaho*, 508 U.S. 1, 7 (1993); *Soriano v. United States*, 352 U.S. 270, 276 (1957).

That WTP named federal agencies as defendants does not preclude application of the doctrine of sovereign immunity here. *See Meyer*, 510 U.S. at 475 ("[a]bsent a waiver, sovereign immunity shields the Federal Government and its agencies from suit"). *See also, e.g., Webman*, 441

F.3d at 1025; *Kalodner v. Abraham*, 310 F.3d 767, 770 (D.C. Cir. 2003); *Galvan v. Fed. Prison Indus.*, 199 F.3d 461, 463 (D.C. Cir. 1999). A suit against a federal agency is one against the sovereign if "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act." *Dugan v. Rank*, 372 U.S. 609, 620 (1963) (citations omitted); *accord Galvan*, 199 F.2d at 463. Here, WTP's complaint is one to compel the United States and its agencies to provide "documented and specific answers" to WTP's questions and to enjoin the United States and its agencies from enforcing the tax laws against individual plaintiffs. (A. 101–02.) Accordingly, the complaint is one that seeks both "to restrain the Government from acting" and "to compel it to act" subject to the jurisdictional bar of sovereign immunity. *See Dugan*, 372 U.S. at 620.

In the district court, WTP argued that, because WTP sought "only a declaratory judgment and injunctive relief, . . . the 'sovereign immunity' doctrine cannot bar [WTP] from maintaining this action." (A. 165; *see also* A. 168.) But sovereign immunity bars suits against the

Government for equitable relief as well as for damages. *See, e.g.*, *Webman*, 441 F.3d at 1025–26 (statute that waives sovereign immunity to equitable relief does not extend to money damages); *Settles v. U.S. Parole Commission*, 429 F.3d 1098, 1104 (D.C. Cir. 2005) (42 U.S.C. § 1983 does not waive federal government's sovereign immunity to suit for declaratory and injunctive relief). The cases WTP cited below (A. 165), *Lane*, 518 U.S. at 196–200 (holding that sovereign immunity was not waived for claims for monetary damages under Rehabilitation Act Amendments of 1986), and *Czerkies v. U.S. Dep't of Labor*, 73 F.3d 1435, 1438–39 (7th Cir. 1996) (holding that sovereign immunity had been waived for nonmonetary claim alleging denial of due process), are not to the contrary. Indeed, both decisions note that Congress had waived the Government's sovereign immunity to certain suits for nonmonetary relief. *See Lane*, 518 U.S. at 196; *Czerkies*, 73 F.3d at 1438.

B. WTP fails to show a waiver of sovereign immunity to its claims

"The plaintiffs bear the burden of proof for establishing jurisdiction," including a waiver of sovereign immunity. *Sopcak v. N.*

Mountain Helicopter Serv., 52 F.3d 817, 818 (9th Cir. 1995); *accord Fostvedt v. United States*, 978 F.2d 1201, 1203 (10th Cir. 1992). The amended complaint asserted jurisdiction under 28 U.S.C. §§ 1331, 1343, 1391(e), and 2679(b)(1) and 42 U.S.C. § 1983. (A. 90–91.) None of these provisions waives the Government's immunity to WTP's claims. WTP also argued below that 5 U.S.C. § 702 provided a basis for jurisdiction. (A. 167, 171.) But WTP fails to show "agency action" within the meaning of that statute, which, moreover, does not permit judicial review of WTP's claims with respect to federal taxes, which are barred by the Anti-Injunction Act, I.R.C. § 7421(a) and the Declaratory Judgment Act, 28 U.S.C. § 2201(a).

1. 28 U.S.C. § 1331. The amended complaint (A. 91) asserted jurisdiction under 28 U.S.C. § 1331, which gives district courts jurisdiction over civil actions arising under the Constitution, laws, or treaties of the United States. General jurisdictional statutes like Section 1331, however, do not waive sovereign immunity; rather, the jurisdiction such statutes confer on the federal district courts is limited to cases in which the Government has consented to be sued. *Shanbaum*

v. United States, 32 F.3d 180, 182 (5th Cir. 1994); *Fostvedt*, 978 F.2d at 1203; *Arford v. United States*, 934 F.2d 229, 231 (9th Cir. 1991).

WTP argued in the district court that the 1st Amendment's Petition Clause "operates as a constitutional antidote to the doctrine of sovereign immunity" (A. 167), and *amici*[3] argue to this Court that, under the First Amendment, "a citizen suing the government has all of the rights to use those compulsory processes of law to obtain just redress under the law, as such a citizen has against any other wrongdoer" (*Amicus* Br. 3). The Supreme Court has held, however, that the constitutional nature of a claim does not bar the application of sovereign immunity. *See, e.g., Meyer*, 510 U.S. at 477–78 (Federal Tort Claims Act does not waive sovereign immunity for constitutional claims); *see also Czerkies*, 73 F.3d at 1437–38 ("[n]o statute waives the sovereign immunity of the United States . . . to constitutional claims generally"); *Navy, Marshall & Gordon, P.C. v. U.S. Internat'l Dev. Cooperation Agency*, 557 F. Supp.

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[3] Constitutional Defender Association and John Wolfgram have moved to file a brief in this appeal as *amici curiae*.

484, 488 (D.D.C. 1983) ("[n]either 28 U.S.C. § 1331, nor any provision of the Constitution, is a waiver of sovereign immunity").

2. 28 U.S.C. § 1343 and 42 U.S.C. § 1983. WTP asserted jurisdiction under 28 U.S.C. § 1343 and 42 U.S.C. § 1983, alleging that "Plaintiffs' civil rights have been violated." (A. 91.) Section 1343, which gives the district courts jurisdiction over civil-rights actions, is a "jurisdictional adjunct to the civil rights statutes" and "does not embody a waiver of sovereign immunity as against the U.S." *Navy, Marshall & Gordon*, 557 F. Supp. at 488. Section 1983 creates a cause of action against "every person who, under color of [state law] . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution." 42 U.S.C. § 1983. As this Court has recognized, "Section 1983 does not apply to federal officials acting under color of federal law." *Settles*, 429 F.3d at 1104–05. *See also District of Columbia v. Carter*, 409 U.S. 418, 425 (1973); *Hindes v. FDIC*, 137 F.3d 148, 158 (3d Cir. 1998); *Carman v. Parsons*, 789 F.2d 1532, 1534 (11th Cir. 1986).

WTP did not allege that the Government acted under state law in failing to "properly respond" to WTP's petitions or in enforcing the Code against individual plaintiffs. That certain states' income-tax and tax-enforcement programs "piggyback" on federal tax law and enforcement programs, and that the federal government and state government participate in joint enforcement programs, as WTP argued below (A. 205), does not mean that the Government acts under color of state law when it enforces the Internal Revenue Code. *Cf. Settles*, 429 F.3d at 1106 ("[d]espite its role in administering parole for D.C. Code offenders, the Commission retains the immunity it is due as an arm of the federal sovereign").

3. 28 U.S.C. § 2679(b). WTP asserted a waiver of sovereign immunity under 28 U.S.C. § 2679(b)(2), part of the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346(b), 2671 *et seq.* (A. 90.) The FTCA waives sovereign immunity and provides a cause of action against the United States for the common-law torts of its employees. 28 U.S.C. § 2674. The FTCA does not waive the Government's sovereign

immunity for constitutional torts. *Meyer*, 510 U.S. at 477–78; *McCollum v. Bolger*, 794 F.2d 602, 608 (11th Cir. 1986).

The FTCA, which waives sovereign immunity for suits against the Government for money damages, does not waive the Government's immunity to WTP's claims, which are solely for nonmonetary relief. (*See* A. 102–03.) Moreover, the FTCA expressly excludes from its scope "[a]ny claim arising in respect of the assessment or collection of any tax," 28 U.S.C. § 2680(c), a provision that has been given broad application to suits for damages stemming from activities undertaken to collect taxes. *See Fishburn v. Brown*, 125 F.3d 979, 982 (6th Cir. 1997); *Aetna Cas. & Surety Co. v. United States*, 71 F.3d 475, 478 (2d Cir. 1995); *Perkins v. United States*, 55 F.3d 910, 913 (4th Cir. 1995). In any event, WTP did not allege that any of the individual plaintiffs filed an administrative claim for relief, a jurisdictional prerequisite to filing suit under the FTCA. 28 U.S.C. § 2675. For these reasons, the FTCA does not waive the Government's sovereign immunity to WTP's claims.

4. 5 U.S.C. § 702. Although the statute was not referred to in its complaint, WTP suggested in the district court that Section 702

of the Administrative Procedure Act, 5 U.S.C., provided a basis for jurisdiction. (A. 167; *see also* A. 171.)[4] Section 702 provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 U.S.C. § 702. In this case, the amended complaint failed to show or allege that WTP was aggrieved in any way by final "agency action within the meaning of a relevant statute." *See* 5 U.S.C. §§ 551(13), 702, 704.

In any event, WTP's amended complaint falls within an exception to the waiver of sovereign immunity provided in Section 702, which states that nothing in that provision "affects other limitations on judicial review or the power or duty of the court to dismiss any action or

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[4] WTP suggested below that the Department of Justice's purported concession that Section 702 waived sovereign immunity in another case involving Schulz precluded the Government from asserting that § 702 did not waive sovereign immunity here. (A. 160–70.) No such estoppel applies to this case, which involves other issues. In any event,"[s]overeign immunity may not be waived by federal agencies." *Settles*, 429 F.3d at 1105; *see also Czerkies*, 73 F.3d at 1438 ("[t]he issue is a jurisdictional one, so we are not bound by the government's concession").

deny relief on any other appropriate legal or equitable ground" or "confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought." 5 U.S.C. § 702. *See also* 5 U.S.C. § 701(a)(1) (judicial review unavailable under APA if "statutes preclude judicial review"); *Fornaro v. James*, 416 F.3d 63, 66 (D.C. Cir. 2005) (APA excludes from its waiver of sovereign immunity claims for which adequate remedy is available elsewhere and claims seeking relief are forbidden by another statute); *Transohio Sav. Bank v. OTS*, 967 F.2d 598, 607 (D.C. Cir. 1992) (same); *Lee v. Blumenthal*, 588 F.2d 1281, 1283 (9th Cir. 1979) (Section 702, "by its own terms, does not affect existing limitations on district court jurisdiction").

In this case, the Anti-Injunction Act, I.R.C. § 7421, is precisely such a limiting statute, precluding exercise of jurisdiction under Section 702. *See* discussion, *infra; see also Hughes v. United States*, 953 F.2d 531, 537 (9th Cir. 1992) (Section 702's limited waiver of sovereign immunity does not override other statutory provisions prohibiting injunctive relief from the collection of taxes); *Lonsdale v. United States*,

919 F.2d 1440, 1444 (10th Cir. 1990) (same); *Warren v. United States*, 874 F.2d 280, 282 (5th Cir. 1989) (same).

C. The Anti-Injunction Act, I.R.C. § 7421(a), precludes the injunctive relief WTP seeks

1. The Anti-Injunction Act bars injunctive suits with respect to federal taxes

WTP's claims are expressly barred by the Anti-Injunction Act, I.R.C. § 7421(a). This statute provides generally that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom the tax is assessed." The principal purpose of the Anti-Injunction Act is to preserve the Government's ability to assess and collect taxes with "a minimum of preenforcement judicial interference" and "to require that the legal right to disputed sums be determined in a suit for refund." *Bob Jones Univ. v. Simon*, 416 U.S. 725, 736 (1974). The Anti-Injunction Act deprives the courts of jurisdiction to enjoin any aspect of IRS activity directed towards the assessment or collection of federal taxes. *Id.* at 738–39. Further, "allegations that the IRS acted with bad faith, non-tax related motives

. . . do not render the Anti-Injunction Act inapplicable." *Judicial Watch, Inc. v. Rossotti*, 317 F.3d 401, 406 (4th Cir. 2003); *see also Bob Jones Univ.*, 416 U.S. at 740 (plaintiff's attribution of non-tax-related motives to the IRS "ignores the fact that the [taxpayer] has not shown that the Service's action was without an independent basis in the requirements of the Code"). A proceeding that falls within the Act's proscription must be dismissed for lack of subject-matter jurisdiction. *See Alexander v. "Americans United" Inc.*, 416 U.S. 752, 757–58 (1974).

By seeking an order from the district court requiring the Government to respond to WTP's requests for admissions with respect to federal taxes, and to suspend enforcement of the Code against individual plaintiffs until this was accomplished, WTP's request plainly was "for the purpose of restraining the assessment or collection of any tax." I.R.C. § 7421(a). The Anti-Injunction Act precluded the district court from exercising jurisdiction over these claims.[5]

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[5] Although the complaint stated that it sought "declaratory relief," the relief sought was to "constrain[ ]" the Government to meet its alleged obligations under law, *i.e.*, an affirmative injunction. (A. 102.) In any event, 28 U.S.C. § 2201 exempts from the scope of the

2. None of the exceptions to the Anti-Injunction Act applies here

In addition to certain statutory exceptions to the Anti-Injunction Act not relevant here, the Supreme Court has recognized two limited judicial exceptions: where the plaintiff has no alternative legal avenue for challenging a tax, *South Carolina v. Regan*, 465 U.S. 367, 373 (1984), and where "it is clear that under no circumstance could the Government ultimately prevail" and "equity jurisdiction otherwise exists," *Enochs v. Williams Packing & Navig. Co.*, 370 U.S. 1, 7 (1962). *See National Taxpayers Union v. United States*, 68 F.3d 1428, 1436 (D.C. Cir. 1995). Neither of these exceptions applies to permit this suit with respect to the tax claims at issue.

In *South Carolina*, 465 U.S. at 373–81, the Court held that the Anti-Injunction Act did not preclude the State of South Carolina from

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Declaratory Judgment Act disputes "with respect to federal taxes." *See Flora v. United States*, 362 U.S. 145, 164–65 (1960); *Foodservice and Lodging Inst., Inc. v. Regan*, 809 F.2d 842, 844 (D.C. Cir. 1987). Accordingly, to the extent that WTP sought a declaratory judgment with respect to federal taxes, the Government had not waived its sovereign immunity to its claims.

filing an original action in the Supreme Court to enjoin enforcement of a provision in the Code because Congress had not provided the state with an alternative method of contesting the exaction. The Court stressed, however, that its holding did not extend to organizations of taxpayers who had such alternative remedies: "[b]ecause taxpayers have alternative remedies, it would elevate form over substance to treat such organization as if they did not possess alternative remedies." 465 U.S. at 381 n.19. *See also National Taxpayers Union*, 68 F.3d at 385 (even if organization had independent standing to challenge tax law, *South Carolina* exception "does not apply to litigation of tax claims by organizations that represent taxpayers"); *Foodservice and Lodging Inst., Inc. v. Regan*, 809 F.2d 842, 844–45 (D.C. Cir 1987) (*South Carolina*'s "narrow exception" to Anti-Injunction Act did not apply to claims of trade organization whose members had alternative remedy).

In this case, the individual plaintiffs have alternative remedies to challenge the assessment and collection of their federal taxes. Code Sections 6213(a) and 7442 permit taxpayers to sue the Commissioner of Internal Revenue, before the tax is assessed and payment is required,

by filing a petition in the Tax Court for redetermination of tax deficiencies asserted by the Commissioner. In addition, taxpayers may sue for a refund of taxes in the district court or Court of Federal Claims after the taxes have been paid. 28 U.S.C. §§ 1346, 1491. Further, taxpayers may challenge collection actions in proceedings under I.R.C. §§ 6320 and 6330. Taxpayers may sue for damages for wrongful disclosure of tax information, wrongful levies, wrongful failure to release liens, or wrongful collection actions. I.R.C. §§ 7426(a), 7431–33. As noted above, the principal purpose of the Act is to prevent taxpayers from circumventing the precisely defined channels established by Congress for the adjudication of tax disputes. Accordingly, the exception recognized in *South Carolina* is inapplicable here.

In *Williams Packing*, the Supreme Court held that the Anti-Injunction Act is inapplicable if the taxpayer establishes both that (i) equity jurisdiction would otherwise exist and (ii) it is clear that the Government could not prevail on the merits in any circumstances. This exception must be construed narrowly in favor of the Government. *See Randell v. United States*, 64 F.3d 101, 107 (2d Cir. 1995).

Here, WTP failed to show the existence of equity jurisdiction. *See Younger v. Harris*, 401 U.S. 37, 43–44 (1971) ("the basic doctrine of equity jurisprudence [is] that courts of equity should not act . . . when the moving party has an adequate remedy at law and will not suffer irreparable injury if denied equitable relief") (quoted in *National Taxpayers Union*, 68 F.3d at 385). WTP's members have adequate legal remedies in the form of Tax Court petitions, refund suits, and collection due process proceedings. *See National Taxpayers Union*, 68 F.3d at 385. As the district court observed, "Congress has provided methods for challenging the legality of such enforcement actions and to prevent governmental abuse." (A. 9.) These avenues of relief satisfy the requirements of due process. *Phillips v. Commissioner*, 283 U.S. 589, 595 (1931); *see Bob Jones Univ.*, 416 U.S. at 746.

Further, WTP also cannot establish that the Government will not prevail on the merits in any circumstances. *See Williams Packing*, 370 U.S. at 7; *National Taxpayers Union*, 68 F.3d at 387. As the district court held, WTP's amended complaint failed to state a claim upon which relief could be based. WTP's claims that the First Amendment requires

the Government to "properly respond" to its questions and allows individual plaintiffs to refuse to comply with the federal tax laws until these answers are provided are utterly without merit. *See* discussion, Part II, *infra.*

Accordingly, the district court lacked jurisdiction to grant the relief sought by WTP.

II

The complaint was correctly dismissed for failure to state a claim upon which relief could be granted

Standard of review

A district court's conclusion that a complaint fails to state a claim upon which relief can be granted is reviewed *de novo*. *Covad Communications Co. v. Bell Atlantic Corp.*, 398 F.3d 666, 670 (D.C. Cir. 2005).

A. Introduction

In its complaint, WTP asserted that, under the First Amendment, it had a right to petition the Government, and that this right necessarily imposed upon the Government an obligation to respond to

its petitions. WTP alleged that it had petitioned the Government to explain why the income and social security tax were not in violation of the United States Constitution. WTP further alleged that, rather than properly responding to its petitions, the Government retaliated against WTP and its members for asserting their First Amendment right to petition by taking enforcement actions against individual members, whereby the Government sought to collect outstanding tax liabilities, such as filing liens and levies. The district court held that WTP failed to state a claim upon which relief could be granted. As we demonstrate below, that holding is correct and should be affirmed.

B. The First Amendment imposed no obligation on the Government to "properly respond" to WTP's petitions

WTP contends that the First Amendment, particularly the Petition Clause, entitles it to a response to its petitions and that "[n]on-responsive 'responses,' including silence, are repugnant to the Petition Clause." (Br. 20.) As the district court held, WTP's allegation that the Government failed to "properly respond to Plaintiffs' petitions for

redress of grievances" does not state a claim upon which relief can be granted.

The First Amendment provides that "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." It thus "protects the right of an individual to speak freely, to advocate ideas, to associate with others, and to petition his government for redress of grievances" as well as "the rights of associations to engage in advocacy on behalf of their members." *Smith v. Ark. State Highway Employees, Local 1315,* 441 U.S. 463, 464 (1979). *See also McDonald v. Smith,* 472 U.S. 479, (1985) ("[t]he right to petition is cut from the same cloth as the other guarantees of [the First] Amendment, and is an assurance of a particular freedom of expression"). The Government is thus prohibited from infringing on these guarantees either by prohibiting certain forms of advocacy or by sanctioning the expression of particular views. *Smith,* 441 U.S. at 464.

But the First Amendment right to associate and to advocate provides no guarantee that any particular petition will be effective, or

even be heard. *Smith*, 441 U.S. at 464 . The Supreme Court has repeatedly and consistently held the "the First Amendment does not impose any affirmative obligation on the government to listen [or] to respond" to the petitions of citizens or to recognize and bargain with associations of citizens. *Smith*, 441 U.S. at 465; *see also Minnesota State Board v. Knight*, 465 U.S. 271, 286 (1984) (plaintiffs "have no constitutional right as members of the public to a government audience for their policy views"); *Bi-Metallic Inv. Co. v. State Board of Equalization*, 239 U.S. 441, 445 (1915) (rejecting due process as a source of an obligation to listen); *DeGrassi v. City of Glendora*, 207 F.3d 636, 647 (9th Cir. 2000) ("the First Amendment does not guarantee that citizens' speech will be heard").

WTP (Br. 14–15) and *amici* (*Amicus* Br. 8) argue that the right to petition implies a right to receive a response. The Supreme Court has rejected this argument: "[n]othing in the First Amendment or in this Court's case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or

respond to individuals' communications on public issues." *Minnesota State Board*, 465 U.S. at 285.

WTP relies upon commentary in certain law journal articles to argue that the Petition Clause, as originally conceived, encompassed a right to governmental response to any document that might be denominated a "petition." According to some of this commentary, at the founding of the Republic, the Petition Clause implied a "congressional duty to respond." Akhil R. Amar, "The Bill of Rights as a Constitution," 100 Yale L. J. 1131, 1156 (1991). In the Civil War era, however, Congress enacted rules abolishing the duty to respond, a change later sanctioned by the Supreme Court. Note, "A Short History of the Right to Petition Government for the Redress of Grievances," 96 Yale L. J. 142, 164 (1986); *Bieregu v. Reno*, 59 F.3d 1445, 1453 (3d Cir. 1995). Although sometimes arguing that it may be inconsistent with the meaning of petitioning in colonial times, the commentary cited by WTP generally agrees that interpreting the right of petition to impose a duty on the Government to consider or act upon petitions addressed to it "could exceed the practical limitations of our system of government;

with our present capacity for multiplying documents, the business of government could be halted if each paper produced in a massive petition campaign is addressed." Norman Smith, "'Shall Make No Law Abridging . . .': An Analysis of the Neglected, But Nearly Absolute, Right of Petition," 54 U. Cin. L. Rev. 1153, 1190–01 (1986); *see also* Note, 96 Yale L. J. at 165 ("[t]he original character of the right of petition may impose an untenable restraint on the autonomy and agenda setting power of the federal legislature").

Whatever the merits of competing academic arguments, however, the Supreme Court has fully considered the question and has held that citizens "have no constitutional right to force the government to listen to their views." *Minnesota State Board*, 465 U.S. at 283, and that "the First Amendment does not impose any affirmative obligation on the government" to recognize, bargain with, or respond to groups like WTP, *Smith*, 441 U.S. at 4. Accordingly, WTP's contention that this is a "first-impression case" (Br. 13) is incorrect. As in *Smith*, it appears that the Government in this case has, according to the allegations of the complaint, simply chosen not to respond to WTP's petitions. Under the

First Amendment, the Government is free to do this. *See also San Filippo v. Bongiovanni*, 30 F.3d 424, 437 (3d Cir. 1994) ("the petition clause does not require the government to respond to every communication that the communicator may denominate a petition"); *Cecilia Packing Corp. v. United States Dep't of Agriculture*, 10 F.3d 616, 623 (9th Cir. 1993) ("'[t]he First Amendment guarantees the right to participate in the political process; it does not guarantee success'") (citation omitted); *Fraternal Order of Police v. Ocean City*, 916 F.2d 919 (4th Cir. 1990) ("the First Amendment does not demand that government officials be accessible to all who wish to influence their policy decisions").

WTP's efforts to distinguish this controlling precedent lack merit. WTP argues that *Minnesota State Board*, *Smith*, and *Bi-Metallic* all involved state or local government policymaking, while the instant case involves "Constitutional torts and [WTP's] natural Right to hold Government accountable to the Constitution." (Br. 22.) This, however, is mere bootstrapping; the existence of such a constitutional violation depends upon the recognition of a First Amendment obligation to

respond to the correspondence of private citizens, an obligation that does not exist. Moreover, WTP's insistence that it seeks, not to influence policy, but "to enforce the rules laid out in the founding documents" (Br. 19), is contrary to its assertion that "[t]he Petition Clause confers a positive right for citizens to participate directly in government" (Br. 19) and the demands of its petitions that, *inter alia*, the President should "[s]ubmit to Congress a bill calling for the formal repeal of the federal Individual Income Tax laws" (A. 468).

WTP seeks to compel highranking federal officials to enter into "good faith exchanges" with WTP and to provide "documented and specific answers" to WTP's questions. But such officials should be protected from unnecessary interference with the work that they have been elected or appointed to perform. In a representative democracy, efforts to change the agenda of such officers are "to be registered principally at the polls." *Knight*, 465 U.S. at 285.[6]

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[6] In fact, those who contend that the income tax is unconstitutional will find adequate guidance in official publications and court opinions as to the Government's opinions on such contentions. *See, e.g. Why Do I Have to Pay Taxes?*, IRS Pub. No. 2105 (Rev. 10-

C. The First Amendment imposes no obligation on the Government to refrain from enforcing the federal tax laws against individual plaintiffs

Not only does WTP argue that it has a First Amendment right to a response from the Government to its petitions, it claims that the individual plaintiffs have a right under that Amendment to "retain[ ] their money until their grievances are redressed." (Br. 20.) *See also Amicus* Br. 4 ("[i]f the people's right to petition according to the general processes of law for justice be denied . . ., they have the *lawful* right to seek justice through violence or any other means against government") (emphasis in original). As the district court held, taxpayers have no First Amendment right to withhold taxes and to avoid governmental

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2003); Rev. Rul. 2005-19, 2005-14 IRB 1 (March 14, 2005) ("[t]he Sixteenth Amendment to the U.S. Constitution was properly ratified and authorizes the federal income tax. . . . Filing a federal income tax return, paying federal income tax, and incarceration for failure to comply with federal income tax obligations is not involuntary service or slavery prohibited by the Thirteenth Amendment"); "The Truth About Frivolous Tax Arguments," www.irs.gov/pub/irs-utl/friv tax.pdf. Moreover, the judiciary has been responding to such anti-tax arguments for decades. *E.g., Schiff v. United States*, 919 F.2d 830 (2d Cir. 1990); *Miller v. United States*, 868 F.2d 236, 241 (7th Cir. 1989); *Wilcox v. Commissioner*, 848 F.2d 1007 (9th Cir. 1988).

enforcement actions because they object to governmental policy. WTP cites no case recognizing such a "right," nor are we aware of any.

Instead, courts have recognized that, where taxes are withheld as an act of civil disobedience, the taxpayer will not be sheltered from enforcement of the tax laws. *See Kahn v. United States*, 753 F.2d 1208, 1216 (3d Cir. 1985) (discussing Thoreau's imprisonment for refusing to pay poll taxes in protest of Mexican-American War). The law with respect to such protesters is clear: whatever their cause, their civil disobedience will subject them to the sanctions provided by the law they have violated. *See, e.g., Adams v. Commissioner*, 170 F.3d 173, 182 (3d Cir. 1999) ("plaintiffs engaging in civil disobedience through tax protests must pay the penalties incurred as a result of engaging in such disobedience"); *United States v. Rowlee*, 899 F.2d 1275, 1279 (2d Cir. 1990) ("[t]he consensus of this and every other circuit is that liability for a false or fraudulent tax return cannot be avoided by evoking the First Amendment"); *United States v. Kelley*, 864 F.2d 569, 576–77 (7th Cir. 1989) (actions respecting tax shelters that constitute more than mere advocacy not protected by First Amendment); *Kahn*, 753 F.2d at 1214

("[n]either the statute nor the legislative history suggest a basis for any exception based upon the taxpayer's subjective state of mind"); *Welch v. United States*, 750 F.2d 1101, 1108 (1st Cir. 1985) ("noncompliance with the federal tax laws is conduct that is afforded no protection under the First Amendment"); *United States v. Ness*, 652 F.2d 890, 892 (9th Cir. 1981) ("[t]ax violations are not a protected form of political dissent"); *United States v. Malinowski*, 472 F.2d 850, 858 (3d Cir. 1973) ("[t]o urge that violating a federal law which has a direct or indirect bearing on the object of protest is conduct protected by the First Amendment is to endorse a concept having no precedent in any form of organized society where standards of societal conduct are promulgated by some authority").

It follows that, contrary to WTP's assertions, the IRS and the Department of Justice had not retaliated against WTP members who refused to pay their tax liabilities "by sending Plaintiffs threatening letters; placing liens on Plaintiffs' property; levying and seizing Plaintiffs' property and/or wages; raiding Plaintiffs' homes and/or offices; forcing Plaintiffs to appear before administrative, civil and/or criminal

tribunals; denying Plaintiffs due process; or by other enforcement actions." (A. 89; *see also* A. 82, 85, 99–100.) Instead, the so-called "retaliatory actions" listed in the complaint are all authorized and incident to the necessary enforcement of our nation's civil and criminal federal tax laws. *See, e.g.*, I.R.C. § 6303 (requiring IRS to send demands for payment of taxes), § 6321 (lien on taxpayer's property arises by operation of law), § 6331 (authorizing administrative levies on wages and other property), §§ 7601–08 (authorizing issuance of summonses, carrying of firearms, and entry upon taxpayers' property and other examinations), §§ 7402–05 (authorizing actions to enforce liens and other civil actions), §§ 7407–08 (authorizing actions to enjoin return preparers, promoters of abusive tax shelters, and persons aiding and abetting the understatement of tax liability), and §§ 7271–75 (listing tax-related crimes and offenses); 28 U.S.C. §§ 515, 547 (authorizing U.S. Attorneys and delegates of the Attorney General to prosecute such crimes and offenses). Thus, far from "retaliating," the Government was merely enforcing the law in protection of the public fisc.

Accordingly, WTP has failed to show that individual plaintiffs had a First Amendment right to withhold federal taxes owed to the Government and avoid governmental enforcement actions because of their disagreement with governmental policies.[7]

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[7] Although WTP did not cite 28 U.S.C. § 1361, the relief WTP sought arguably was in the nature of mandamus, that is, an order by the district court requiring the Government to respond to its questions and to stop enforcing the tax laws against individual plaintiffs. (*See* A. 102–03.) Mandamus is a drastic remedy, appropriate only in extraordinary circumstances. *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34–35 (1980); *Fornaro*, 416 F.3d at 69. For a plaintiff to be entitled to mandamus, it must be clear from the face of the complaint that: (1) the plaintiff has a clear right to the relief sought; (2) there is a clear and peremptory duty on the Government's part to do the act in question; and (3) no other adequate remedy is available. *United States ex rel. Girard Trust Co. v. Helvering*, 301 U.S. 540, 543–44 (1937); *Fornaro*, 416 F.3d at 69. Considered as a petition for writ of mandamus, WTP's amended complaint failed to state a claim under Section 1361, for the reasons stated above.

CONCLUSION

For the foregoing reasons, the district court should be directed to dismiss the case for lack of jurisdiction or, in the alternative, the order of the district court is correct and should be affirmed.

Respectfully submitted,

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(s) Carol Barthel

Attorney for appellees

Dated: April 24, 2006

ADDENDUM

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Administrative Procedure Act (5 U.S.C.):

Sec. 702. Right of review

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title) , and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.

Sec. 704. Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the

action meanwhile is inoperative, for an appeal to superior agency authority.

Internal Revenue Code (26 U.S.C.):

Sec. 7421. Prohibition of suits to restrain assessment or collection

(a) *Tax.*—Except as provided in sections 6015(e), 6212(a) and (c), 6213(a), 6225(b), 6246(b), 6330(e)(1), 6331(i), 6672(b), 6694(c), 7426(a) and (b)(1), 7429(b), and 7436, no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

*   *   *   *   *

28 U.S.C.:

Sec. 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

Sec. 1343. Civil rights and elective franchise

(a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:

*   *   *   *   *

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States.

* * * * *

Sec. 1361. Action to compel an officer of the United States to perform his duty

The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

Sec. 2201. Creation of remedy

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

* * * * *

Federal Tort Claims Act (28 U.S.C.):

Sec. 2674. Liability of the United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent

as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

* * * * *

Sec. 2675. Disposition by federal agency as prerequisite; evidence

(a) An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section.

* * * * *

Sec. 2679. Exclusiveness of remedy

* * * * *

(b) (1) The remedy against the United States provided by sections 1346(b) and 2672 of this title . . . is exclusive of any other civil or proceeding for money damages by reason of the same subject matter against the employee who act or omission gave rise to the claim. . . .

(2) Paragraph (1) does not extend or apply to a civil action against an employee of the Government—

(A) which is brought for a violation of the Constitution of the United States.

*   *   *   *   *

Sec. 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to—

*   *   *   *   *

(c) Any claim arising in respect of the assessment or collection of any tax.

*   *   *   *   *

42 U.S.C.:

Sec. 1483. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or another person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

*   *   *   *   *